

CHARLES R. WENDEL
Claimant

YSIDRO EXCAVATING
Respondent

GENERAL CASUALTY OF WISCONSIN

ORDER

APPEARANCES

RECORD AND STIPULATIONS

ISSUES

The Administrative Law Judge (ALJ) found respondent is entitled to a subrogation lien in the amount of \$153,136.24 for payments of compensation and medical expenses made after August 12, 1998. The ALJ further determined respondent is entitled to an

\$8,651.10 credit against future workers compensation benefits and ordered respondent to resume payment of compensation and medical benefits to claimant.

The claimant requests review of the following: (1) Whether the respondent waived its right to a credit under K.S.A. 44-504 by failing to claim the credit for future payments and by continuing to pay compensation benefits after the third party recovery; and, (2) If respondent did not waive its subrogation rights, the amount of third party recovery contains elements that are not duplicative of workers compensation benefits. Claimant argues his lost wages will exceed the amount of permanent total disability compensation over his lifetime. And that the loss of enjoyment of life is an element of his recovery which is not duplicative of workers compensation benefits and therefore not subject to being offset.

Respondent argues it is entitled to a subrogation lien in the amount of \$153,136.24 for payments of compensation and medical expenses actually made after the settlement of the third party claim on August 12, 1998. Respondent further argues it is entitled to an additional credit of \$8,651.10 against its liability for any workers compensation benefits payable in the future.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

This matter was presented to the Administrative Law Judge based upon an agreed stipulation of facts. The ALJ summarized the facts in the following fashion:

The facts of this case are not in dispute. Claimant suffered a work related injury on August 18, 1997, when his tractor-trailer was struck by a train. As a result of his injuries, [c]laimant is permanently and totally disabled. Claimant now requires twenty-four hour a day nursing care provided by his brother who is also his guardian/conservator.

On August 12, 1998, [c]laimant settled his third party personal injury claim for the total amount of \$750,000.00. Respondent had paid compensation and medical expenses in the total amount of \$499,087.48. Respondent asserted its subrogation lien for that amount at the time of settlement. Claimant received the remaining \$250,912.52. After subtracting attorney fees and expenses, [c]laimant's conservatorship received the remaining balance of \$161,787.34.

On August 12, 1998, the existing workers compensation lien of [r]espondent and its insurance carrier was satisfied. Respondent continued to pay [c]laimant permanent disability compensation and medical expenses through March 2001 in the total

amount of \$153,136.24. Respondent and its insurance carrier demanded payment from [c]laimant's conservator for that amount. When the conservator declined payment, the insurance carrier refused to pay further medical expenses or compensation benefits.¹

Under the Workers Compensation Act, the employer is subrogated to the extent an employee recovers damages from a third-party tort-feasor who was either responsible for or contributed to the work-related accident.² The employer is subrogated to the extent that workers compensation benefits were paid from the date of accident up to the date of recovery of damages. If the recovery exceeds the total amount of workers compensation benefits that were paid up to the date of recovery, the excess is to be credited against future payments of disability and medical compensation.³

K.S.A. 44-504(b) provides in pertinent part:

Whenever any judgment in any such action, settlement or recovery otherwise is recovered by the injured worker or the worker's dependents or personal representative prior to the completion of compensation or medical aid payments, the amount of such judgment, settlement or recovery otherwise actually paid and recovered which is in excess of the amount of compensation and medical aid paid to the date of recovery of such judgment, settlement or recovery otherwise shall be credited against future payments of the compensation or medical aid.

Claimant argues that respondent failed to request a credit for future payments after the August 12, 1998 settlement of the third party claim. Respondent then continued to pay claimant compensation and medical benefits. Accordingly, claimant argues respondent has waived its right to a credit for future payments.

Claimant relies on the *Flott*⁴ case to support his argument that the voluntary payment of benefits after the settlement results in a waiver of the right to credit for those payments. In *Flott*, the injured worker settled his third party claim as a result of negotiations. During those negotiations the employer agreed to pay future compensation and medical benefits. But at the time the settlement was negotiated there had been a statutory amendment to K.S.A. 44-504 which provided that any portion of the third party recovery which exceeded the workers compensation benefits paid to the date of recovery would be credited against future payments. Before this amendment the statute had provided that the employer's subrogation

¹ ALJ Award (Sep. 13, 2004) at 4.

² K.S.A. 44-504(a) (Furse 1993).

³ K.S.A. 44-504(b) (Furse 1993).

⁴ *Flott v. Wenger Mixer Manufacturing Co.*, 189 Kan. 80, 367 P.2d 44 (1961).

lien was the amount of workers compensation benefits paid to the date of such recovery. The Supreme Court concluded the parties had determined that the pre-amended statute controlled when they negotiated their agreement. Otherwise, there would have been no further obligation for the employer as the amount of the settlement would have exceeded any future workers compensation benefits. Although the parties may have been mistaken regarding the applicability of the amended statute, the Court concluded that the negotiations resulted in a waiver of the employer's right to a credit for future payments and because the injured worker relied upon his employer's representations that it would make future payments, the employer was estopped from making a further claim for credit relying upon the amended statute.

In the instant case, there is no indication that respondent stated it would not seek a credit for future payments. Nor was evidence proffered that this was the intent of the parties or that such negotiations occurred. Based upon the stipulated facts and exhibits it cannot be said respondent waived its right to a credit for future payments made in duplication of the settlement proceeds from the third party claim. Nor was evidence proffered indicating detrimental reliance by claimant such that respondent should be estopped from asserting its right to a credit for future payments after the third party claim was settled. Accordingly, the *Flott* case is factually distinguishable. The claimant failed to meet his burden of proof to establish respondent waived its statutory right to a credit.

The subrogation credit is limited in amount to the sum that the actual recovery exceeds those benefits that were paid up to the date of recovery. Based upon the stipulated facts, the claimant's actual recovery in the third party claim exceeded the amount of workers compensation benefits paid to the date of settlement by the amount of \$161,787.34. Accordingly, respondent was entitled to a subrogation credit in that amount.

The Workers Compensation Act lacks effective means to enforce subrogation liens and claims for those benefits that are paid before the recovery of damages. Actions against third parties must be brought in District Court. The Act does not give the Division the authority to enter either a judgment against an employee or order the employee to reimburse an employer the amount of its subrogation claim. Further, unlike in the District Court where damages are paid into the court for satisfaction of judgment and dispersal, the Division of Workers Compensation is not paid funds upon which it can attach liens.

The only remedy the Act provides the Division of Workers Compensation in subrogation claims is the authority to apply a subrogation credit against future disability and medical compensation. In light of the above, the ALJ's Award is affirmed to the extent that it provides a credit in the amount of \$161,787.34 against workers compensation benefits that accrued after claimant's tort recovery or will accrue in the future. But the Award is modified to provide that respondent is not required to resume actual payment of medical and compensation benefits until the credited amount has been exhausted.

Claimant next argues that the amount he received for settlement of his third party claim on August 12, 1998 includes monetary recovery that does not duplicate workers compensation benefits. The employer is entitled to a subrogation lien on the tort recovery by the claimant only to the extent that the recovery duplicates compensation benefits and medical expenses paid by the employer.⁵

The documents attached as exhibits to the parties Stipulations included a proposed Release of Claims and the proposed Journal Entry of Dismissal with Prejudice.⁶ The release does not contain an itemization of the total amount of the settlement of the third party claim. Instead it contains general language that there is a release “from any and all claims, actions, causes of action, demands or rights, based on contract or in tort or otherwise, for damages, injuries, costs, loss of service, loss of consortium, expenses, wrongful death and any compensation whatsoever,”

The only documents provided to the ALJ do not establish an amount of the settlement that was for identified non-duplicative losses. It should be noted that although there was mention of loss of service and loss of consortium, which are not subject to the respondent’s lien, the parties stipulated that claimant was not married at the time of the accidental injury. Here, claimant has failed to provide a verdict form or other court document that permits the determination of the extent, if any, the subrogation credit should be reduced. Based upon the evidence provided, the claimant has failed to meet his burden of proof that his recovery in the third party action does not duplicate the compensation and medical benefits provided by respondent. Therefore, the respondent’s subrogation credit for payments made after the settlement is not reduced.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated September 13, 2004, is modified to reflect respondent is not required to resume payments until the stipulated \$161,787.34 credit is exhausted and affirmed in all other respects.

IT IS SO ORDERED.

⁵ *Wishon v. Cossman*, 268 Kan 99, 991 P.2d 415 (1999); *McGranahan v. McGough*, 249 Kan. 328, 820 P.2d 403 (1991).

⁶ Stipulations filed July 14, 2004, Ex. C.

Dated this _____ day of March 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
 Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
 Nelsonna Potts Barnes, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director